IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 57 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

JAMES SAMWEL . . . . . APPELLANT

VERSUS

THE REPUBLIC . . . . . RESPONDENT
(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Rwakibarila, J.)

dated the 31st day of October, 2008

in

Criminal Appeal No. 132 of 2006

JUDGMENT OF THE COURT

23rd & 27th November, 2015

RUTAKANGWA, J.A.:

Thomas Masatu, Mashaka Mumbwi and Sospeter Mumbwi are residents of Mahina area Mkuyuni within the City of Mwanza. They all, as of 6th April, 2002, lived in one house. Indeed, Sospeter and Mashaka are brothers.

On 6th April, 2002, the trio had slept at their house. While Thomas Masatu and Mashaka had slept in one room sharing one bed, Sospeter had slept in a separate room.

At around 02.00hrs, the trio was rudely awakened from their slumber by two bandits who gained entry into their residence by forcing open the door of the house. On entering the house, the bandits went straight into the room wherein Masatu and Mashaka were sleeping.

The two bandits, who were carrying a torch with them, were armed with a machete. Without further ado, they started physically assaulting the two youths who were aged 20 and 24 years respectively. Masatu, in particular, was slashed with the machete on his right leg, arm and thigh, inflicting dangerous cut wounds on him.

After the brutal assault, the bandits left, taking with them the victims' one piece of sponge mattress, one radio (make Panasonic), a wall clock, a speaker, a pair of shoes and a bag containing clothes and cash Tshs.20,000/=. Before leaving the house the two bandits locked the occupants inside the room from outside. With the departure of the bandits, the victims of the robbery raised an alarm. People who responded to the alarm, included Sospeter Mumbwi and a ten-cell leader named Said Uliza.

The incident was reported at Igogo police post. The two victims allegedly told Sospeter, Uliza and the police, that they had identified the two bandits to be Soli Rajabu and James Samwel. The two were subsequently arrested on divers dates and charged before the District Court of Mwanza District (*"the trial court"*) with the offence of armed robbery. At the trial, T. Masatu, Mashaka Mumbwi and Sospeter Mumbwi testified as PW1, PW2 and PW3 respectively.

In his affirmed evidence, Soli Rajabu denied the charge, claiming that he had been arrested at his home on 7th April, 2002, at 5.00 p.m. by police officers who were on a swoop for brewers of illicit liquor.

On his part, James Samwel told the trial court that he was arrested on the midnight of 19th April, 2002, by police officers for no apparent reason.

In his judgment, the learned trial District Magistrate, immediately after giving a summary of the evidence from both sides and without any evaluation of the same, held thus:

> *"It is evident from the evidence of PW1 and PW2 that they were invaded by the 1st and 2nd accused and they were cut with panga and robbed. The*

PW1 and PW2 managed to identify the assailants by the help of koroboi which was illuminating and further the assailants, e.g. first accused used to visit them and is their friend, so with the help of koroboi light they cannot mistaken (sic) the identity of the person whom they know this point also carters (sic) to the second accused whom they used to play gambling together. The accused did not vehemently challenge the issue of identity at the time PW1 and PW2 were giving their testimony . . ."

On the basis of the above reasoning, the learned Magistrate concluded as follows:

"So I find as a fact PW1 and PW2 sufficiently recognized their assailants as the two accused persons in the dock. And through that, there is no doubt that the two accused were the one who robbed PW1 and PW2 and injured them in the course of that robbery."

We find it our duty to point out at the outset that this judgment was glaringly lacking in analysis and fell too short of the requirements of section 312 of the Criminal Procedure Act, Cap. 20, Vol. 1 R.E. 2002(*"the C.P.A."*)

The two accused persons were accordingly found guilty as charged, convicted and sentenced to thirty (30) years imprisonment each. Their appeals to the High Court against conviction were unsuccessful. However, Soli Rajabu had his custodial sentence quashed and was sentenced to twelve strokes of the cane as he was 16 years old when he committed the offence and, therefore, a *"young person"* in terms of section 22 (2) of the Children and Young Persons Act, Cap. 13.

In his equally short and an unanalytical judgment, the leaned first appellate judge accepted the reasoning of the trial court and considered that PW1 and PW2 had unmistakably identified the two appellants before him. He reasoned that *"so long as appellants were not strangers to PW1 and PW2, their identification in a room from the lamp was proper."* Being a first appeal, he did not subject the entire evidence to a fresh objective analysis either to assess the credibility of the two purported eyewitnesses or to satisfy himself on whether the circumstances prevailing at the scene of the crime were conducive to an impeccable positive identification of the two appellants as the robbers. His failure to do so gives us the jurisdiction to re-evaluate the evidence leading to the conviction of Soli Rajabu and James Samwel, who alone is challenging the High Court judgment in this

appeal. We are not surprised that Soli preferred no appeal because the learned first appellate judge wrongly invoked the provisions of s. 22 (2) of Cap. 13, and saved him from the custodial sentence, as the said Soli was not *"under the age of sixteen years."*

James Samwel (*"the appellant"*) has lodged a memorandum of appealing listing seven grounds of complaint.

On the whole, he is faulting the High Court on sustaining his conviction for armed robbery, which conviction in his view, was predicated on unreliable contradictory and apparently untruthful visual identification evidence. The appellant appeared in person before us to argue his appeal. When the grounds of appeal were read out to him, he opted to adopt them. Apart from urging us to hold that PW1 Masatu, PW2 Mashaka and PW4 Sospeter had given contradictory evidence which dented their credibility, he had nothing to say in elaboration of the same.

On the other hand, Ms. Angelina Nchalla, learned Senior State Attorney, for the respondent Republic, forcefully argued in favour of the judgments of the two courts below. It was her strong contention that the evidence of both PW1 Masatu and PW2 Mashaka unerringly placed the

appellant at the scene of the crime as the two bandits who not only stole the two victims' itemized properties but also inflicted bodly injuries on both of them. She further confidently argued that the light from a wick-lamp which was burning in the room, enabled the two eyewitnesses to make an unmistaken identification of the appellant and Soli as the two robbers. She accordingly pressed us to dismiss the appeal in its entirety.

In our determination of this appeal, we have found it convenient to begin by making it absolutely clear that the fact that both PW1 Masatu and PW2 Mashaka were the victims of an armed robbery committed at their residence by two robbers on the night of 5th/6th April, 2002, has never been disputed. What has all along been at issue between the prosecution and the defence was **the identity of the two robbers**. Was the appellant and Soli the two robbers as claimed by PW1 Masatu and PW2 Mashaka, or were they victims of honest but mistaken eyewitnesses and/or lying witnesses in view of the naked fact that none of the accused persons was found in possession of the robbed properties.

We take the law on visual identification in this country to be well settled. Briefly, it is to the effect that such evidence is of the weakest character and in a case depending for its determination essentially on

identification, be of a single witness or more than one such witness, such evidence must be watertight, even it be evidence of recognition as was the case here. As this Court aptly held in the case of **Nhembo Ndalu v. R.**, Criminal Appeal No. 33 of 2005 (unreported),:-

> *"In law, . . . for evidence to be watertight, it must be relevant to the fact or facts in issue, admissible, credible, plausible, cogent and convincing as to leave no room for a reasonable doubt."*

It is clear in our minds that the law has placed such a high threshold because *"in most cases even where witnesses purport to give direct evidence, there is always a common fear of manufactured evidence":* see, for instance, **Mathias Bundala v. R.,** Criminal Appeal No. 62 of 2004 (unreported). Similar sentiments had thus been expressed by Shaw, C.J. in **Commonwealth v. Webster** (1850) 50 Mass. 255:-

> *"The advantages of positive evidence is that it is the direct testimony of a witness to the fact to be proved who, if he speaks the truth, saw it done, and the only question is whether he is entitled to belief. The disadvantage is that the witness may be false or corrupt and the case may not afford the means of detecting his falsehood."*

The evidence of PW1 Masatu and PW2 Mashaka was such positive evidence. If it were truthful as Ms. Nchalla has persistently pressed us to hold, it certainly would have proved the guilt of the appellant and his colleague to the hilt with the precision of mathematics. Ms. Nchalla, like the learned trial magistrate and the first appellate judge took that position, because the appellant and Soli who were previously well known to the two witnesses had been identified by the latter at the scene of the crime, which was lit by light from a wick-lamp.

It is indeed true that both identifying witnesses testified that they were aided in their alleged identification of the bandits by light from a wick-lamp which they claimed was on when the bandits struck. They never went further to elaborate on the intensity of the light, the size of the room, the position of the wick-lamp and the distance in between it and the bed.

Given the above pertinent facts, which even Ms. Nchalla conceded to, the two courts below ought to have approached the proffered prosecution identification evidence with the greatest circumspection. The duty to do so was heightened by the fact that the attack was sudden, terrorizing, the victims had been suddenly awakened from their sleep and immediately

assaulted. Indeed, PW2 Mashaka, while under cross-examination, conceded that when the bandits entered he was under shock.

Both the learned trial magistrate and first appellate judge did not take this judicial approach, however. They took it for granted that so long as there was light from the wick-lamp and the accused persons/appellants were known to the two prosecution witnesses, there was no possibility of any mistaken identification. They were, in our respectful opinion, entirely wrong, and Ms. Nchalla fell into the same error. We shall demonstrate why we are saying so.

This Court in **Kashima Mnadi v. R.,** Criminal Appeal NO. 78 of 2011 (unreported) had this to say:

> ". . . evidence must be given to show very clearly the intensity of the light they produced so that to enable the court assert whether the conditions prevailing were favourable for proper identification. Bare assertion is not enough. This Court, in **Issa Mgara @ Shuka v. R.,** Criminal Appeal No. 37 of 2005 (unreported) observed:
>
> > *'In our minds, we believe that it is not sufficient to make bare assertions that there*

was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick-lamps, lanterns, etc. give out light with varying intensities . . . Hence the overriding need to give in evidence sufficient details on the intensity of the light and size of the area illuminated . . ."

Recently, this Court in the case of **Elipafula Timotheo v. R.,** Criminal Appeal No. 350 of 2014 (unreported) discounted the evidence of visual identification and recognition used to convict the appellant for failing to *"eliminate possibilities of mistaken identity and recognition of the appellant"* as, like the evidence of PW1 Masatu and PW2 Mashaka, it did not cross the threshold set out in the **Issa Mgara** and **Kashima Mnandi** cases (supra). We too are convinced that the so-called recognition evidence of PW1 Masatu and PW2 Mashaka did not eliminate beyond reasonable doubt the possibilities of mistaken identification of the appellant and his co-acussed.

We are confidently asserting so because as we lucidly stated in the case of **Juma Magori @ Patrick and Four Others v. R.,** Criminal Appeal No. 328 of 2014 (unreported):-

"We are also aware that recognition evidence could not be trouble free; as was stated by Lord Lane in ***R. v. Bently*** *[1991] Criminal Law Review 620 (C.A.), even mistakes in recognition of close relatives and friends are often made (****Issa Mgara @ Shuka*** *(supra)."*

But that is not all. This Court in the cases of **Mengi Paulo S. Luhanga & Another v. R.**, Criminal Appeal No. 222 of 2006, **Joseph Mkumbwa & Another v. R.,** Criminal Appeal No. 87 of 2001 and **John Bulagomwa & Two Others v. R.**, Criminal Appeal No. 56 of 2013 (all unreported), aptly observed that

"Eyewitness testimony can be a very powerful tool in determining a person's guilt or innocence. But it can also be devastating when false witness identification is made due to honest confusion or outright lying."

The above observation is in line with the Court's earlier equally apposite holding in the case of **Jaribu Abdalla v. R.**, Criminal Appeal No. 220 of 1994 (unreported). The Court held that:

"In matters of identification it is not enough merely to look at factors favouring accurate identification.

Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

We have scanned the judgments of the two courts below. We emerged from this exercise convinced that the two courts never adverted their minds to this salutary holding, hence the appellant's complaint that the evidence used to convict him was apparently untruthful.

Arguing in support of this complaint, the appellant drew our attention to the evidence of PW1 Masatu to the effect that a few minutes after the bandits had entered their bed room, they put off the wick-lamp and began using their torch. If that was the case, then it is inconceivable that the witnesses, who were subjected to torchlight, would have recognized their assailants. See, for example, **Michael s/o Godwin & Nyambasha Juma v. R.**, Criminal Appeal No. 66 of 2002 (unreported). On the part of PW2 Mashaka, however, it was his evidence that the bandits put off/blew out the wick-lamp as they were leaving the scene of the crime with their loot. Ms. Nchalla failed to offer any explanation to account for this glaring discrediting contradiction.

On our part, we have discerned from the evidence another equally discrediting contradiction from the prosecution witnesses. This is that while both PW1 Masatu and PW2 Mashaka confidently asserted that they physically recognized the appellant and Soli as the two robbers and so reported to PW3 No. C.9461 D/Cpl. Chacha at Igogo police post, they were belied on this by the latter witness. PW3 D/Cpl. Chacha testified that, the two witnesses reported to him that they had recognized the appellant and Soli as the robbers by their voices only. When the Court drew the attention of Ms. Nchalla to this piece of evidence, her snap response was that we should expunge that evidence from the record, an unjudicial invitation we cannot accept in order to perpetuate an injustice.

There is another disquieting and patent feature in the evidence of PW1 Masatu and PW2 Mashaka which the two courts below never alluded to. As we have already shown above, the two witnesses were very categorical that they recognized the appellant and Soli as the only bandits and mentioned them immediately to all those people who responded to their alarm. PW2 Mashaka further unequivocally testified that Soli was their neighbour, whose residence was only 150 paces from their residence. The evidence on record is clear on the fact that nobody went to look for

the said Soli on that night or early the next day. The evidence on record does not account for this omission. The only reasonable inference to be drawn is that these witnesses never mentioned immediately the identities of the robbers to anybody. That was why the ten-cell leader was never offered as a prosecution witness and no efforts were made to arrest the appellant until after a lapse of two (2) weeks, when there is no claim that he had taken to flight. Furthermore, that was why one Gerald Isaya Mpingo had been arrested and jointly charged with Soli before the appellant was arrested on 19th April, 2002 and arraigned on 22nd April, 2002. As a matter of fact, the charge against the said Gerald Mpingo was withdrawn on 5th July, 2002. All these facts prove that PW1 Masatu and PW2 Mashaka were mendacious in their claims that they had identified the appellant and Soli as the robbers. How near to the truth, then, is the Russian proverb which runs thus:

"He lies like an eyewitness."

From the above discussion we find ourselves constrained to hold that the conviction of the appellant and Soli was not based on honest but mistaken recognition evidence but on false evidence of PW1 Masatu and PW2 Mashaka. For this reason, we find merit in this appeal which we

hereby allow in its entirety. We accordingly quash the conviction of the appellant and set it aside as well as the prison sentence of thirty years. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

Since the conviction of Soli Rajab was premised on the same apparently contrived evidence, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, to quash the conviction and set it aside as well as the sentence of corporal punishment.

DATED at MWANZA this 26th day of November, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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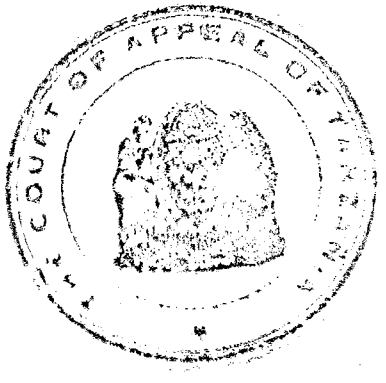

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DEPUTY REGISTRAR
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